APPEAL NO. 010336

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). Following a contested case hearing held on December 28, 2000, the hearing officer resolved the disputed issues by determining that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the sixth quarter and that she has permanently lost entitlement to SIBs pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.106(a) (Rule 130.106(a)). The claimant has requested our review. She asserts that the hearing officer's conduct of the hearing was unprofessional, that she was discouraged from calling witnesses, and that she has no ability to work despite the report of the functional capacity evaluation (FCE) she underwent. She seeks a new hearing before a different hearing officer so that she can call certain witnesses. The respondent (carrier) urges in response that the evidence is sufficient to support the hearing officer's determinations and that the hearing officer did not commit reversible error in his conduct of the hearing.

DECISION

Affirmed.

The claimant testified that during the qualifying period for the sixth quarter, she worked at a grocery store for four hours on a Saturday and Sunday (July 1 and 2, 2000) handing out product coupons, and that she was paid $132.00 even though she was unable to complete the six-hour shift on either day because of her neck pain and despite the fact that she could sit, stand, walk, and change positions at will. She contended that during the qualifying period she had no ability to work whatsoever and that such contention is supported by the records of Dr. F, her nephew and treating doctor, who has provided her with chiropractic treatment since September 1996, and of Dr. T, who has provided her with cervical injections. She said she had not had surgery on her neck. The claimant also made the point that she was able to qualify for Social Security disability benefits in June 1999 without a contested case hearing.

Dr. F wrote on July 11, 2000, that he had reluctantly released her for a part-time job on June 28, 2000; that she had severe exacerbation requiring treatments on July 5 and 6, 2000; that her condition deteriorated considerably since June 28, 2000; and that it is now obvious that even part-time sedentary work is not an option at this time. Dr. T, whose diagnosis is chronic neck pain from multiple degenerated discs, wrote on July 18, 2000, that in her opinion the claimant could not work at a sedentary level, not even part time, because any physical demand on her body to sit, stand, or walk for an extended period of time, or use of her arms, would greatly aggravate her neck and because her neck pain requires that she lie down periodically during the day. The hearing officer made no specific findings as to whether one or more of these reports satisfied the requirement of Rule 130.102(d)(4) for a narrative report from a doctor which specifically explains how the injury causes a total inability to work.

The hearing officer did, however, specifically find that the claimant did not comply with Rule 130.102(d)(4); that there are "other records" showing that the claimant has some ability to work; that the "other records" are competent and credible; and that the claimant did have some ability to work during the qualifying period and did not spend sufficient time or energy seeking employment. The lengthy and detailed June 30, 1999, report of the FCE conducted by Mr. B, a licensed physical therapist, states that the claimant, then 61 years of age, has numerous subjective complaints and severe pain ratings, even doing sedentary activities; that she exhibited numerous inconsistencies throughout the testing including specifying a pain rating of "7" during the interview, hypersensitivity to light touch, positive Waddell signs for symptom magnification, inappropriate guarding with sit to supine positions, inconsistent cervical and left shoulder range of motion, invalid manual muscle testing of upper and lower extremities, invalid grip strength testing, and no obvious cardiovascular stress during any of the functional testing; and that she had a high coefficient of variables with isometric testing. Mr. B concluded that based on the FCE testing results the claimant exhibits the physical capabilities of sedentary work physical demands. Dr. M, an orthopedic surgeon, reported to the carrier on October 12, 1999, that he reviewed Mr. B's FCE report; that the report seems correct and accurate and he agrees with its conclusions; and that he feels the claimant could return to a sedentary job if she could qualify for one. Dr. M also stated that he feels that no treatment will change the fact that the claimant has diffuse multiple joint problems which are mainly a product of aging.

On February 15, 2000, Mr. B reported that he reviewed the report of an FCE performed on February 2, 2000, at another facility; stated in some detail the testing results obtained; and concluded that based on this FCE the claimant exhibited the physical capabilities of performing sedentary physical demand characteristics and should be able to do alternate sitting, standing, and short walking if these positions can be alternated as needed. Dr. M wrote on February 15, 2000, that he reviewed Mr. B's February 15, 2000, report, and agrees with Mr. B that the claimant could perform sedentary work if it is available.

The statutory and Commission rule requirements for entitlement to SIBs based on a total inability to work during the qualifying period, as well as applicable case law, was set out in our previous decisions on the claimant's entitlement to SIBs for the third, fourth , and fifth quarters and need not be repeated here. *See* Texas Workers' Compensation Commission Appeal No. 000512, decided April 24, 2000; Texas Workers' Compensation Commission Appeal No. 001350, decided July 25, 2000; and Texas Workers' Compensation Commission Appeal No. 001877, decided September 19, 2000. We are satisfied that the hearing officer's determinations that during the qualifying period the claimant had some ability to work and failed to make a good faith attempt to obtain employment commensurate with her ability to work and that she is, therefore, not entitled to SIBs for the sixth quarter are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Since we affirm the decision that the claimant is not entitled to SIBs for the sixth quarter, we also affirm the determination that she has permanently lost entitlement to SIBs pursuant to Section 408.146(c) and Rule 130.106.

Having carefully reviewed the record we are satisfied that the hearing officer committed no reversible error in his conduct of the proceedings.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Robert W. Potts
Appeals Judge